No. —

In the Supreme Court of the United States

OCTOBER TERM, 1946

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

GREYVAN LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Specifications of errors to be urged	9
Reasons for granting the writ	10
Conclusion	13
Appendix	14

CITATIONS

Cases:

Burlingham v. *Gray*, 22 Cal. 2d 87, 137 Pac. 2d 9	11
Carroll v. *Social Security Board*, 128 F. 2d 876	7
Gulf Refining Co. v. *Brown*, 93 F. 2d 870	11
Johnson v. *Steele*, 154 Ore. 137, 59 Pac. 2d 237	11
Jones v. *Goodson*, 121 F. 2d 196	7
Magnolia Petroleum Co. v. *Johnson*, 149 Ark. 563, 233 S. W. 680	11
Magnolia Petroleum Co. v. *Pierce*, 132 Okla. 167, 269 Pac. 1076	11
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	11
Radio City Music Hall Corp. v. *United States*, 135 F. 2d 715	7
Railroad Co. v. *Hanning*, 15 Wall. 649	7
Singer Manufacturing Co. v. *Rahn*, 132 U. S. 518	7
Standard Oil Co. v. *Anderson*, 212 U. S. 215	11
Texas Co. v. *Higgins*, 118 F. 2d 636	7
Texas Co. v. *Jackson*, 174 Miss. 737, 165 So. 546	11
United States v. *Anderson*, 269 U. S. 422	13
United States v. *Rindskopf*, 105 U. S. 418	13
United States v. *Silk*, No. 312 Oct. Term, 1946	10
United States v. *Vogel, Inc.*, 145 F. 2d 609	7
Walling v. *Rutherford Food Corp.*, 156 F. 2d 513	12
Welch v. *Helvering*, 290 U. S. 111	13
Western Express Co. v. *Smeltzer*, 88 F. 2d 94	11
Williams v. *United States*, 126 F. 2d 129; certiorari denied, 317 U. S. 655	7

72b140—46—1

Statutes:

	Page
Internal Revenue Code:	
Sec. 1400 (26 U. S. C. 1400)	16
Sec. 1401 (26 U. S. C. 1401)	16
Sec. 1410 (26 U. S. C. 1410)	16
Sec. 1426 (26 U. S. C. 1426)	16
Sec. 1600 (26 U. S. C. 1600)	16
Sec. 1607 (26 U. S. C. 1607)	16
Social Security Act, c. 531, 49 Stat. 620:	
Sec. 801 (42 U. S. C. 1001)	14
Sec. 802 (42 U. S. C. 1002)	14
Sec. 804 (42 U. S. C. 1004)	14
Sec. 811 (42 U. S. C. 1011)	15
Sec. 901 (42 U. S. C. 1101)	15
Sec. 907 (42 U. S. C. 1107)	15
Miscellaneous:	
Treasury Regulations 90:	
Art. 205	19
Art. 207	19
Treasury Regulations 91:	
Art. 3	19
Art. 14	19
Treasury Regulations 106:	
Sec. 402.204	16
Sec. 402.227	18
Treasury Regulations 107:	
Sec. 403.204	19
Sec. 403.227	19

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The Solicitor General, on behalf of Carter H. Harrison, individually and as Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on July 12, 1946, affirming the decision of the District Court of the United States for the Northern District of Illinois.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals (R. 254–259) is reported 156 F. 2d 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1946. (R. 259.) On

September 19, 1946, a justice of this Court entered an order enlarging the time within which to file a petition for certiorari for a period of 60 days from October 12, 1946, or until December 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether truckmen who furnished their services and their own trucks in hauling goods under written contracts with the taxpayer and the helpers of such truckmen were performing services as employees of taxpayer within the provisions of Section 811 (b) and 907 (c) of the Social Security Act, and Sections 1426 (a) and 1607 (c) of the Internal Revenue Code as amended.

2. Whether the court erred in holding that the Commissioner's determination of the amounts of taxable wages was arbitrary, the amounts of taxable wages having been determined under an agreement between taxpayer and the Collector of Internal Revenue and taxpayer having offered no evidence to show that the determination was erroneous.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

Taxpayer brought these actions for the refund of taxes levied and collected under Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the Internal Revenue Code, for the year 1937 to 1942, inclusive, in the total amount of $32,226.49, plus interest. The undisputed facts may be briefly summarized as follows:[1]

Taxpayer, an Indiana corporation, is a common carrier operating over irregular routes in transporting household and other goods in 38 states and certain Canadian provinces. It was authorized to conduct its business under the grandfather clause of the Motor Carrier Act of Congress and applicatory acts and regulations of the several states, being certificated by the Interstate Commerce Commission and the regulatory authorities of the various states. It made written contracts with a number of owners of motor vehicle equipment hereinafter referred to as "truckmen", the pertinent provisions of which are briefly as follows:[2]

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[1] Unless otherwise indicated the facts are taken from the findings of the District Court (R. 219–227).

[2] The provisions of the contract are summarized in the opinion of the Circuit Court of Appeals (R. 255–256). It was stipulated that the sample contract introduced in evidence as Exhibit A is identical in form to all the other contracts involved. (R. 121–122.) The contract is among the original exhibits in the case which do not appear in the printed record but are on file in the case.

The truckman was to furnish taxpayer for its exclusive service the trucks and equipment required in the transportation business. The trucks were required to be painted with colors designated by the taxpayer and repainted whenever the latter deemed it necessary. (Ex. A, Par. 1.) The truckman was to devote the trucks exclusively to taxpayer's service in hauling, loading and unloading goods in accordance with taxpayer's shipping contracts "and in connection therewith comply with all the rules and regulations and instructions of the Company". (Ex. A, Par. 2.)

The truckman was to hire any labor required incident to picking up, loading and delivering shipments "at his own expense and in his own employ and which shall be under his direction and control." (Ex. A, Par. 3.) The truckman was personally to drive the trucks except that he might use a competent helper as a relief driver and employ a substitute in unforeseen circumstances upon notifying the company and obtaining its approval, but either the truckman or substitute was required in such case to remain on the truck. (Ex. A, Par. 5.)

The truckman was required to load, unload, place on delivery, set up and take apart for shipping purposes all furniture and other goods "in accordance with the tariffs, rules and regulations of the Company". (Ex. A, Par. 6.) The truck-

man was to furnish fire, theft, collision and property damage insurance, the taxpayer being authorized to take out such insurance and charge it to the truckman's account. Taxpayer was to furnish cargo insurance on the goods transported. (Ex. A, Par. 7.) Each truckman was required to post a fidelity bond of $1,000 covering himself and substitute driver if any. (Ex. A, Par. 8.)

The truckman was to bear all operating costs such as property taxes, resident, vehicle license fees, fuel, tires and repairs, while the taxpayer was to bear the costs of permits and licenses for operations in its services under federal or state law. (Ex. A, Par. 13 (e).) The truckmen were not permitted to haul for other companies, breach of this provision making the contract subject to termination by taxpayer. (Ex. A, Par. 14.) The truckmen were to receive as remuneration a percentage of the pre-determined tariff charges ranging from 50% to 52%, plus an additional bonus up to three percent of the tariff charges for satisfactory personal appearances, mental attitude and good mechanical condition of the trucks. (Ex. A, Schedule 7.) All contracts and bills of lading for the hauling of goods were required to be between taxpayer and the shipper or consignor. (Ex. A, Par. 14 (a).) The contracts were subject to cancellation at any time upon written notice by either the truckman or the taxpayer. (Ex. A, Par. 20.) The provisions of the contracts were adhered to by the parties.

Beginning in 1940, taxpayer issued to each truckman "A Manual for Truckmen" containing numerous instructions and directions concerning the manner and method of operating the trucks, loading and unloading goods, crating, packing, etc., of furniture, and conduct of truckmen and helpers while on duty. Prior thereto bulletins were issued containing similar instructions. (R. 140–141.) Each truckman in the service or who later entered the service after the manual was issued received a copy of the manual. (R. 141.)[3]

The manual provided that the truckmen's duties were prescribed by the "rules" and such additional "orders" as might be issued by the general office. (Ex. 1, Rule 1.) The truckmen were required to belong to a designated labor union (Ex. 1, Rule 9) and to submit to physical examinations at any time (Ex. 1, Rule [redacted]). The company adopted for the truckmen's wear a prescribed uniform of cap, jacket, trousers and shirt to be worn with necktie, belt and shoes of a designated color. (Ex. 1, Rule 10.) The truckman must report at loading and unloading neatly shaven and with neat clean clothing (Ex. 1, Rule 11); they could use no alcoholic beverages while on duty (Ex. 1, Rule 12); they were required to see that their helpers abided by all the rules of the manual. The helpers were required to be members in good

[3] This manual (Ex. 1) is included among the original exhibits on file in this Court.

standing of labor unions and the truckmen were required to hire union helpers whenever possible and pay them standard union wages. (Ex. 1, Rule 17.) The truckmen must patronize and be available only at parking lots designated by the taxpayer. (Ex. 1, Rule 19.) They could take no time off at home or elsewhere without the taxpayer's consent. (Ex. 1, Rule 22.) On all trips they must take the most practicable route between designated points. (Ex. 1, Rule 23.) The curtains on the windows of the cab were required to be plain blue or white. (Ex. 1, Rule 25.) The manual was issued to the helpers as well as the truckmen. (R. 181–182.)[4]

Taxpayer's chief dispatcher, upon receiving information as to the contracts of shipment, assigned and gave loading and routing instructions as to the

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[4] The court below stated that an officer of the company testified that the manual "had been impracticable and was not adhered to" (R. 257). The manual was, however, indubitably issued to the truckmen, and they were not informed that they were free to disregard it. (R. 141.) In any event it is the right to control and not the actual exercise of control which is significant in determining the existence of an employment relationship. *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518; *Railroad Co.* v. *Hanning*, 15 Wall. 649, 656–657; *Williams* v. *United States*, 126 F. 2d 129 (C. C. A. 7), certiorari denied, 317 U. S. 655; *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4); *Carroll* v. *Social Security Board*, 128 F. 2d 876 (C. C. A. 7); *Texas Co.* v. *Higgins*, 118 F. 2d 636, 639 (C. C. A. 2); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715 (C. C. A. 2).

hauling of goods to truckmen here involved, as well as other truckmen driving company-owned trucks without distinction, depending on which were available on the parking lots.[5] (R. 145–146.)

Taxpayer obtained a certificate of public convenience and necessity from the Interstate Commerce Commission for its operations. In those proceedings in April, 1939, it filed exceptions (Ex. 13) to an examiner's report (Ex. 11) which had recommended disallowance of the petition for the certificate (Ex. 9) for lack of supporting evidence. Taxpayer stated in its exceptions that its equipment was operated under full management and control and that the equipment and owners were subject to all orders of the taxpayer's representatives and agents. (Ex. 13, p. 8). In October, 1939, taxpayer's counsel in arguing these exceptions before the Commission stated that for all intents and purposes the employer-employee relationship existed between taxpayer and the truckmen. (Ex. 12, pp. 66–67.)

In breaking down the payments to truckmen between wages and sums paid for use of equipment, the Commissioner used the union wage scale in determining wages. The total wages of the helpers were determined to be 41.67% of the wages paid the truckmen. (R. 224.) This

[5] The latter are concededly taxpayer's employees and not involved in this action (R. 222).

determination was based on a prior agreement between the Collector of Internal Revenue and taxpayer's treasurer in charge of the matter under which it was agreed that the allocation was "fair" and the figures used were "correct," although taxpayer's officer acknowledged no liability. (R. 141.) The assessments were made on the basis of the wages so allocated. (R. 25–26.)

The cases were consolidated and tried to the court without a jury. The District Court held that the truckmen were not employees but independent contractors (R. 222), and that the helpers were also not employees of taxpayer but employees of the truckmen (R. 226). It was further held that the determination of the amounts of taxable wages was arbitrary and illegal. (R. 224.) Judgment was entered for the taxpayer. (R. 228–230.) On appeal the Circuit Court of Appeals affirmed.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the persons in question were employees of the respondent and that it was liable for the social security taxes in question.

2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship between the parties in holding and determining that the truckmen and their helpers were not

employees of the taxpayer within the meaning of the Act.

3. The Circuit Court of Appeals erred in its application of the common law test of master and servant in determining that the control of the truckmen over the number and identity of the helpers used in their operations was conclusive proof that they were not employees of the taxpayer.

4. The Circuit Court of Appeals erred in holding that the Commissioner's assessments and determinations of amounts of taxable wages of the truckmen and helpers were arbitrary.

REASONS FOR GRANTING THE WRIT

1. This case, like *United States* v. *Silk*, No. 312, certiorari granted October 21, 1946, involves the status as employees under the Social Security Act of truck drivers owning their own trucks but working regularly for another enterprise. The cases are similar in the respect mentioned; they differ in that here the taxpayer exercised and had power to exercise considerably greater control over the truckmen than in the *Silk* case. Inasmuch as the problem raised in the two cases is the same, and the facts typical variations of patterns which frequently recur, it is plainly desirable in the interest of clarifying the meaning of the statute that the two cases be heard together.

2. Although the Government contends here, as in the *Silk* case, that a broader rule than the tort,

or common law, test of the employment relationship should be applied in determining whether the truckmen were employees of taxpayer, the Circuit Court of Appeals erred even if the common law test is the proper criterion. Here not only did taxpayer have the right to control the truckmen in a great many important aspects of their work, but it actually exercised such control. While not denying this (R. 258), the court below thought that the truckmen's right to determine the number and identity of their helpers conclusively proved that the truckmen were not employees (R. 258–259). Clearly this one factor is not the conclusive one, as has frequently been held. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 221; *Gulf Refining Co.* v. *Brown*, 93 F. 2d 870 (C. C. A. 4); *Western Express Co.* v. *Smeltzer*, 88 F. 2d 94 (C. C. A. 6); *Barlingham* v. *Gray*, 22 Cal. 2d 87, 137 Pac. 2d 9; *Magnolia Petroleum Co.* v. *Johnson*, 149 Ark. 553, 233 S. W. 680; *Johnson* v. *Steele*, 154 Ore. 137, 59 Pac. 2d 237; *Texas Co.* v. *Jackson*, 174 Miss. 737, 165 So. 546; *Magnolia Petroleum Co.* v. *Pierce*, 132 Okla. 167, 269 Pac. 1076.

In a case raising a similar problem under the Fair Labor Standards Act, now pending on certiorari before this Court, the Circuit Court of Appeals for the Tenth Circuit, following the theory of *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, rather than the common law doctrine, held that the employ-

ment relationship existed despite the authority of the intermediate worker to choose his own subordinates. *Walling* v. *Rutherford Food Corp.*, 156 F. 2d 513, pending on petition for certiorari No. 562. The question as to the meaning of the common law standard in this respect, if that standard is to be applied under the Social Security Act, recurs in a great many cases, and is in itself important enough to warrant review by this Court.

3. Although this would not be an independent ground for certiorari, the decision of the court below should not be permitted to stand because of its holding that the assessments by the Commissioner of Internal Revenue were arbitrary or that the amounts of taxable wages were improperly fixed by the Commissioner. The Commissioner made these assessments by determining the amounts of wages under an allocation of amounts paid the truckmen, broken down between wages and payments for use of equipment. This was in accordance with an agreement between the Collector and taxpayer's treasurer in charge of tax matters. The wages were fixed by the Commissioner on the basis of the best evidence available and the Commissioner's action was recognized by taxpayer's treasurer to be "fair" and "correct" (R. 141.) Taxpayer offered no evidence to show that the assessments were incorrect, and it clearly had the burden to establish their incor-

rectness. *United States* v. *Anderson*, 269 U. S. 422; *United States* v. *Rindskopf*, 105 U. S. 418; *Welch* v. *Helvering*, 290 U. S. 111.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

NOVEMBER 1946.

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

* * * * *

(42 U. S. C. 1001.)

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages

of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * *

(42 U. S. C. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * *

(42 U. S. C. 1011.)

SEC. 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * *

(42 U. S. C. 1101.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some

twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * * *

(42 U. S. C. 1107.)

Similar provisions appear in Section 1400 (1) and (2), 1401 (a) and (b), 1410 (1) and (2), 1426 (a) (1), (b), and (f), 1600 and 1607 of the Internal Revenue Code.

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.204. *Who are employees.*— Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it

shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

* * * * *

SEC. 402.227. *Wages*—(a) *In general.* * * *

* * * * *

The term "wages" means all remuneration for employment unless specifically excepted under section 1426 (a) of the Act (see section 402.228).

The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages within the meaning of the Act if paid as compensation for employment.

The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

* * * * *

Remuneration for employment, unless such remuneration is specifically excepted

under section 1426 (a), constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

* * * * *

Section 403.204 and 403.227, Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, are substantially the same as in the above sections. Articles 205 and 207, Treasury Regulations 90, promulgated under Title IX of the Social Security Act, are substantially the same as the above. Articles 3 and 14, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, are substantially the same as the above.

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